Supreme Court, U.S.
FILED
MAY 2 1997
OFFICE OF THE CLERK

No. 96-1562

In The

Supreme Court of the United States

October Term, 1996

SAMANTHA SISTRUNK,

Petitioner,

vs.

CITY OF STRONGSVILLE, OHIO AND THE BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF STRONGSVILLE

JOHN D. RYAN
Law Director
City of Strongsville
18688 Royalton Road
Strongsville, Ohio 44136
(216) 238-5720

JOHN T. McLANDRICH
Counsel of Record
TODD M. RASKIN
MAZANEC, RASKIN
& RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(216) 248-7906

Attorneys for Respondent
City of Strongsville

71110 (800) 3 APPEAL • (800) 5 APPEAL • (900) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED FOR REVIEW

1. Can Petitioner sustain a custom, policy or practice claim against the City of Strongsville in light of *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997)?

2. Is the conduct of the Bush-Quayle Committee at the candidate rally fairly attributable to the City of Strongsville for purposes of Petitioner's First Amendment claim?

3. Do the First Amendment rights of a political party holding a candidate rally by municipal permit on a public commons include the privilege to control the message of the rally by controlling the expressive activity of persons in the permitted areas of the rally, as opposed to persons in areas outside the rally which are occupied by the general public?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
Summary of the Argument	1
Reasons for Denying the Writ	3
I. Can Petitioner Sustain A Custom, Policy Or Practice Claim Against The City Of Strongsville In Light Of *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997)? ..	3
II. Is The Conduct Of The Bush-Quayle Committee At The Candidate Rally Fairly Attributable To The City Of Strongsville For Purposes Of Petitioner's First Amendment Claim?	7
III. Do The First Amendment Rights Of A Political Party Holding A Candidate Rally By Municipal Permit On A Public Commons Include The Privilege To Control The Message Of The Rally By Controlling The Expressive Activity Of Persons In The Permitted Areas Of The Rally, As	

Contents

Page

Opposed To Persons In Areas Outside The Rally Which Are Occupied By The General Public? 12

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Board of the County Commissioners of Bryan County, Oklahoma v. Brown, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997) ..... i, 2, 3, 4, 5, 6

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 9, 10

Citizens to End Animal Suffering v. Faneuil, 745 F. Supp. 65 (District Court of Mass. 1990) 8

Evans v. Newton, 382 U.S. 269 (1966) 8

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, __ U.S. __, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1985) 5, 12, 13, 14, 15, 16

Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1977) 12, 13, 15, 16

Monnell v. Department of Social Services, 436 U.S. 658 (1978) 3

Contents

	Page
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	7
St. Louis v. Praparotnik, 785 U.S. 112 (1987)	10
United States v. National Treasury Employees Union, __ U.S. __, 115 S. Ct. 1003 (1995)	10
Wolotsky v. Huhn, 960 F.2d 1131 (6th Cir. 1992)	7, 8
Statute Cited:	
42 U.S.C. § 1983	7, 8
United States Constitution Cited:	
First Amendment	*passim*
Other Authority Cited:	
Codified Ordinance, Section 1062	3, 4

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case with the exception that Defendant denies that the Bush-Quayle '92 General Committee, Inc. (hereinafter the "Committee"), "confiscated" the Petitioner's Bill Clinton button "under authority ceded to it by the City of Strongsville" (hereinafter the "City"). Respondent City of Strongsville denies that any such authority was granted or could have been granted by the City of Strongsville to Respondent Bush-Quayle '92 General Committee. The City's conduct included issuance of a permit to use the commons. Respondent City also disagrees with Petitioner's characterization of the scope and reasoning of the Court of Appeals' opinion contained at pages 6 and 7 of Petitioner's Statement of the Case. Petitioner was not merely a member of the "audience," rather she was in the rally proper. The public audience was outside the permitted area.

Petitioner admits she does not dispute the Committee's right to control the content of its own message at the rally. Respondent City of Strongsville does not contend that the Committee has a right to regulate the expressive activity of spectators who assembled in the public park outside the permitted area of the rally.

SUMMARY OF THE ARGUMENT

Petitioner alleges that the Committee violated her First Amendment right by confiscating her Bill Clinton button before letting her into the Bush-Quayle rally. Petitioner alleges the City sanctioned this conduct.

Petitioner, to impose liability on the City of Strongsville, must plead and prove a custom, policy or practice of the municipality which was the moving force behind the violation.

Petitioner does not allege the City directly inflicted the alleged injury. Petitioner must therefore meet the standard of *Board of the County Commissioners v. Brown, supra.* Petitioner's claims and facts do not meet the standard of *Board of Commissioners v. Brown.* The issuing of a permit for the rally and the provision of security are insufficient. Petitioner's allegation of a policy of ceding control over the commons to others is also insufficient under *Board of Commissioners v. Brown, supra.* The City's alleged conduct, even if true, does not satisfy the deliberate indifference to plainly obvious consequence standard.

The City did not sanction this conduct. However, the City asserts the Committee's First Amendment rights allow it to control its expressive message free of interruption, dilution or distortion.

Petitioner's presence in the permitted area of the rally made her a participant in the Committee's expressive conduct. She was not with the audience outside the permitted area. The Committee was entitled to control the expressive message of its rally.

Petitioner was only restricted from the permitted area during the limited time of the rally.

Additionally, the Committee's conduct is not fairly attributable to the City for state action purposes. The City's conduct of issuing a permit and providing security is insufficient to impose liability.

REASONS FOR DENYING THE WRIT

I.

CAN PETITIONER SUSTAIN A CUSTOM, POLICY OR PRACTICE CLAIM AGAINST THE CITY OF STRONGSVILLE IN LIGHT OF *BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA v. BROWN*, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997)?

Pursuant to *Monnell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny and especially the Court's most recent ruling in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997), Respondent City asserts that Petitioner has failed to allege or prove facts sufficient to demonstrate a custom, policy or practice of the City of Strongsville which is necessary to make the City of Strongsville liable for the alleged constitutional deprivation. Petitioner alleged that the City had a municipal policy of entrusting a private party with power to control access to a public forum for purposes of restricting First Amendment speech. However, the facts alleged by Petitioner, even assuming *arguendo* they were true, are insufficient to support such a policy allegation.

While the Strongsville Codified Ordinances, Section 1062, does grant the mayor authority to issue permits for purposes of use and rental of municipal buildings, the mayor's authority under said section extends to permitting use of the premises on a first come, first serve basis. The grounds for denial of the permit are where the purpose will be illegal or immoral or that the use or occupancy will result in excessive noise, destruction of real or personal property, or otherwise be detrimental to the public health, safety or welfare. Nowhere in Codified Ordinance No. 1062 is the mayor given authority to grant the permit holder

the ability to restrict speech on the public commons. Further, nowhere in the Codified Ordinance is the Mayor allowed to restrict access or rental of the commons on the basis of the content of the speech to be engaged in by the entity seeking use of the commons. Ordinance 1062 does not support Petitioner's argument that the mayor is given authority to allow a private party to restrict speech on the public commons.

Petitioner does not allege the City has a policy which is itself unconstitutional. Petitioner does not allege Ordinance 1062 as written is unconstitutional or sanctions unconstitutional conduct. Petitioner also does not allege an ongoing pattern of conduct sufficient to support a custom, *de facto* policy or practice.

The allegations of fact, evidence and argument submitted by Petitioner demonstrates only a policy of issuing permits to those who seek access to the commons for a legitimate purpose. Such a policy is clearly insufficient to impose liability on the municipality for the allegedly wrongful conduct of the Committee. Such a policy is not a "moving force" behind the violation. Petitioner has alleged no facts, which accepted as true, show the City acted with the "requisite degree of culpability" (deliberate indifference to plainly obvious consequences) or that demonstrates "a direct causal link between the municipal action" (issuing a permit and providing security for the President) and the alleged deprivation (confiscation of the button). *Board of the County Commissioners* at pp. 4-5.

Even assuming *arguendo*, Mayor Ehrnfelt could be a final policy maker for purposes of determining use of and access to the Strongsville Commons, there is absolutely no allegation of fact or evidence that this authority extends to or was utilized to restrict speech or authorize the abridgement of First Amendment rights. Petitioner offered nothing more than conclusory

allegations that the City had a policy of allowing the permit holder to restrict speech during its permitted use of the commons.[1]

Petitioner has not pled or proved facts sufficient to sustain her high burden under *Board of the County Commissioners*. The City issued a permit for use of the commons to the Committee. The city provided safety services. These actions do not in themselves represent a policy in violation of Petitioner's constitutional rights. Neither do these facts, or the use of the mayor's honorific title in the fliers or the school district's allowing children to attend, reflect the required degree of municipal deliberate indifference to "plainly obvious consequences" necessary to impose custom, policy or practice liability on the City. There is no allegation of fact sufficient to show the City disregarded a known or obvious consequence of his action.

The conduct attributed to the City is insufficient under *Board of the County Commissioners* to establish municipal liability. Therefore, the City was properly dismissed and this Honorable Court should deny the Petition.

As noted by this Court in *Board of the County Commissioners*:

> Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the

---

1. Certainly, under *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, __ U.S. __, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1985), the City has no authority to require a permit holder to allow dissenting speech.

> municipality is not held liable solely for the actions of its employees.

Board of the County Commissioners at p. 5.

Rigorous standards of culpability and causation are even more appropriate where liability is sought to be imposed on a municipality for the actions of a private third party, here the Committee. The plaintiff must allege facts sufficient to show deliberate indifference to the plaintiff's constitutional rights. Only where the policymaker's conduct would cause a reasonable policymaker to conclude the plainly obvious consequence of his decision would be a deprivation of a party's constitutional right can the officials conduct rise to the level of deliberate indifference. (*Board of the County Commissioners* at pp. 7-8.) In this case, Petitioner would have to plead and prove that the City was deliberately indifferent to the plainly obvious consequences of issuing the permit and providing security and that one of those plainly obvious consequences would be the deprivation of Petitioner's First Amendment rights by a private third party and that the private conduct would be fairly attributable to the City.

The standard for municipal liability is clear. Petitioner's allegations as to Respondent City are clearly insufficient to meet the standard of deliberate indifference to a plainly obvious consequence.

II.

IS THE CONDUCT OF THE BUSH-QUAYLE COMMITTEE AT THE CANDIDATE RALLY FAIRLY ATTRIBUTABLE TO THE CITY OF STRONGSVILLE FOR PURPOSES OF PETITIONER'S FIRST AMENDMENT CLAIM?

Plaintiff argues that the Committee, as a private entity, was acting under color of law and that their actions can be attributed to the City of Strongsville for purposes of imposing liability on the City of Strongsville. In determining whether the conduct of the Committee is fairly attributable to the state for purposes of 42 U.S.C. § 1983, this Honorable Court has delineated three tests for determining when the challenged conduct may be deemed fairly attributable to the state. These tests are the public function test, the state compulsion test and the symbiotic relationship or nexus test. *Wolotsky v. Huhn*, 960 F.2d 1131 (6th Cir. 1992) at 1335, and authorities collected therein.

Under the public function test, plaintiff must allege and/or prove facts demonstrating the public entity is performing a function which is "traditionally the *exclusive* prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); emphasis in original.

Petitioner erroneously argues that the City of Strongsville allowed the Committee to assume the prerogative of the City to regulate free speech on the public commons. The City does not regulate speech on the commons, rather the City regulates availability of the commons. The authority of the City to regulate the use of the commons, pursuant to statute, was by the permit process. The City did not delegate its authority to issue permits to the Committee.

Clearly, the Committee was not exercising a public function in holding a political rally on the commons.

Petitioner also attempted to argue the symbiotic relationship or nexus test. In order to prevail on the symbiotic relationship or nexus test, Petitioner must demonstrate a sufficiently close nexus between the state and the challenged action so that the action of the private party may be fairly treated as that of the state itself. The Petitioner must demonstrate that the state is "intimately involved" in the challenged private conduct in order for that conduct to be attributable to the state for § 1983 purposes. *Wolotsky, supra*, at 135. The cases relied upon by Plaintiff in the Court of Appeals, *Evans v. Newton*, 382 U.S. 269 (1966) and *Citizens to End Animal Suffering v. Faneuil*, 745 F. Supp. 65 (District Court of Mass. 1990) are clearly distinguishable. In *Evans, supra*, the city, in an effort to avoid the civil rights statute, created the trustees as a straw man in order to exercise a function it would otherwise perform. The Court in *Evans* found that the city's use of the trustees to perform the governmental function of operating and maintaining a public park was still state action. However, in the case at bar, the City of Strongsville did not allow the Committee to operate the commons or control access to it as a general matter. Rather, the City merely granted a permit to the Strongsville Republican Organization for a single afternoon for purposes of conducting the rally.

Likewise, in *Citizens to End Animal Suffering, supra*, the city retained an easement to the lanes between the buildings as public ground. As the property had not been leased to the shopping center, the shopping center was without authority to control conduct of an expressive nature within that property. However, in the case at bar, the property controlled by the Committee was, in fact, lent by permit to the Strongsville Republican Organization. As such, the Committee was within its prerogative to regulate access and conduct on the permitted

premises consistent with its obligations under the law, including the First Amendment.

Most importantly, there is absolutely no allegation of fact or evidence sufficient to establish a reasonable inference that the City of Strongsville knew of, condoned or authorized the Committee's action in the alleged constitutional violation of restricting Petitioner's speech.

Petitioner's reliance on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), is without merit. In *Burton, supra*, this Honorable Court found the state to be intimately involved with the operation of a diner at a state owned parking facility where the state acquiesced over an extended period of time in the violation of the constitutional rights of diners at the restaurant in the parking facility. In the case at bar, there is absolutely no allegation of fact or evidence sufficient to establish a reasonable inference that the City knew or acquiesced in any alleged unconstitutional conduct. Further, the alleged conduct occurred on only one occasion. Even assuming that the conduct could be considered a constitutional violation, one incident of conduct is not enough to impute knowledge to the City such that the City can be deemed to have acquiesced in the course of conduct or to have lent its power or prestige to the conduct. *Burton, supra*, at 862.

In the case at bar, the involvement of the City of Strongsville is limited to the issuance of the permit to the Strongsville Republican Organization. While the City of Strongsville did provide security and crowd control measures, these measures were required for the protection of the President and the attendees at the rally and were not, in any way, nor can they be inferred to be, approval of any alleged restriction on speech by the Committee. The fact that Mayor Ehrnfelt, as a politician, lent his name to the ticket to the rally and to the posters

pronouncing the rally, is clearly not conduct performed in his official capacity or on behalf of the City of Strongsville. The City of Strongsville, as an entity, has no authority to support a particular political party or politician. Petitioner has produced no law, allegations or evidence suggesting that the mayor of the City of Strongsville, as part of his official responsibilities or power, as a matter of state law, has authority to endorse a political candidate or political party. Absent such evidence, Petitioner has failed to satisfy the requirement that the conduct of the alleged decision maker flow from state law authority. *See St. Louis v. Praparotnik*, 785 U.S. 112 (1987). As this Honorable Court has recognized, public employees retain their own First Amendment free speech rights to speak out on public matters. *United States v. National Treasury Employees Union*, __ U.S. __, 115 S. Ct. 1003, 1012 (1995). Petitioner's reliance on the use of the mayor's honorific title or the presence of the banner stating "Strongsville Trusts George Bush" is clearly insufficient to rise to the level of joint participation. In fact, Plaintiff cites no case law suggesting that such conduct has ever been held sufficient to rise to the level of joint participation. The fact that the Strongsville City School District, a separate political entity, allowed school children to attend the rally is not evidence of any custom, policy or practice of the City of Strongsville authorizing or condoning an alleged violation of First Amendment rights.

These incidental contacts with the City of Strongsville are insufficient to demonstrate any symbiotic relationship or close nexus between the City and the Committee sufficient to demonstrate that the City has so far insinuated itself with the conduct of the Committee such that the City can be recognized as a joint participant in the challenged activity of the Committee. (*Burton, supra*, at 861-862.)

Petitioner failed to satisfy the requirements for

demonstrating that the Committee acted under color of state law. Petitioner has failed to demonstrate that the Committee performed a traditional public function or that the relationship between the City and the Committee was of sufficient nexus to find the City so far insinuated itself into the conduct of the Committee that the City must be recognized as a joint participant in the challenged conduct. Petitioner has alleged no facts which, if true, would establish City participation in the rally and more importantly, no facts which would demonstrate participation in the decision to ask Petitioner to relinquish her campaign button.

Notwithstanding the Sixth Circuit Court of Appeals' comment that the record was not sufficiently developed to resolve the issue of whether state action was involved in the Committee's private conduct of restricting Petitioner's speech, Respondent City of Strongsville asserts that there was no conduct or nexus between the Committee and the City sufficient to make the conduct of the Committee fairly attributable to the City of Strongsville. Further, and equally importantly, as to Respondent City, there is no custom, policy or practice of the City of Strongsville which was the proximate cause of any alleged constitutional violation.

III.

DO THE FIRST AMENDMENT RIGHTS OF A POLITICAL PARTY HOLDING A CANDIDATE RALLY BY MUNICIPAL PERMIT ON A PUBLIC COMMONS INCLUDE THE PRIVILEGE TO CONTROL THE MESSAGE OF THE RALLY BY CONTROLLING THE EXPRESSIVE ACTIVITY OF PERSONS IN THE PERMITTED AREAS OF THE RALLY, AS OPPOSED TO PERSONS IN AREAS OUTSIDE THE RALLY WHICH ARE OCCUPIED BY THE GENERAL PUBLIC?

While Respondent City was not and is not involved in the First Amendment expressive activity, the City agrees with the Court of Appeals' holding and seeks to support it as an alternative grounds for denying the Petition as to Respondent City.

The lower appellate courts have properly construed and applied *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, __ U.S. __, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1985), in the context of this case and *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1977).

Respondent City of Strongsville asserts that both the Sixth Circuit and the D.C. Circuit properly construed and applied *Hurley, supra*. Petitioner's perceived conflict between the decisions of the Sixth Circuit in this matter and the D.C. Circuit in *Mahoney, supra*, is illusory and results from Petitioner's attempt to avoid the clear implications of *Hurley* and the First Amendment rights of the Committee.

Petitioner attempts to distinguish her case from *Hurley* by arguing that when she entered via ticket the permitted rally area proper that she was not a participant in the rally, but was merely a spectator. By this device, Petitioner attempts to bring herself

within the protections afforded spectators. Petitioner seeks to analogize her attendance at the rally to spectators standing along the sidewalk of the parade route in *Hurley* or in *Mahoney*. However, as found by the Court of Appeals below, Petitioner's participation in the rally proper, by entering the permitted ticketed area of the rally, places her into the Committee's expressive conduct of the rally.

Petitioner's view of the rally and its expressive message is overly narrow. Petitioner seeks to limit the expressive message of the Committee to the speeches from the speaker's podium. However, common sense and the fundamental nature of a rally demonstrate the weakness of Petitioner's argument. The expressive message of a political rally is not the candidates speech in and of itself but is rather the unified expression of support from the rally participants.[2] While the Committee sought to present the largest possible number of persons expressing the message of unified support for the candidacy of George Bush, the Committee in sponsoring the rally was not sponsoring a "debate" which invited a presentation of opposing viewpoints concerning the candidacy of George Bush. To the contrary, the Committee sponsored a political rally whose sole purpose was to put forth the expressive conduct and message of unified support for George Bush.

Petitioner's ability, as in *Hurley* and *Mahoney*, to engage in her dissenting expressive conduct was not restricted beyond her inability to express her message through the permitted medium of the parade or rally. As in *Mahoney* and *Hurley*, Petitioner was entitled to stand on the public sidewalk and express her dissenting message. Unlike *Mahoney*, the Respondent Committee defendants did not seek to prohibit dissenting speech on the adjoining public sidewalks. Rather, the Committee sought

2. Persons supporting an opposing candidate are free to express their dissent, but not at the same time and place.

only to control its own expressive message within the confines of the permitted area.

Petitioner is also incorrect that the suppression of her dissenting speech was viewpoint based. Petitioner's speech was not excluded based on its viewpoint, but was rather excluded because it was not part of the message the Committee chose to express. Where one party is being given access to a locale for an expressive event or is being given access to a medium for an expressive message, the ability to control the content of their message presupposes the restriction of competing interests from expressing their view through that medium or at that locale during the event. These limited restrictions which enable a person or entity to engage in its own expressive conduct free from dilution or distraction does not equal a viewpoint based restriction. Only the limited time, place and manner in which Petitioner sought to express her dissenting view was restricted. Petitioner could have returned to the commons at any other time and have expressed her dissenting speech, Petitioner could have stood on an adjoining sidewalk or anywhere outside the permitted area of the rally and expressed her dissenting speech. Petitioner's speech was not restricted based on viewpoint, but was restricted on time and place.

Petitioner's suggestion that such dissenting speech should be excluded from a speaker's expressive conduct or message only if a reasonable viewer would view it as attributable to the speaker's expressive message is a misapplication of establishment clause case law and is unworkable. To allow a speaker's First Amendment right to be abridged and his message diluted so long as some judicially created reasonable person would not find the extraneous speech attributable to the speaker would do violence to the First Amendment rights of the speaker and would be inconsistent with the very purpose of this Honorable Court's holding in *Hurley*. A speaker's First

Amendment right must clearly extend to the ability to control the content, style and manner of his own expressive conduct without being forced, by a court or state law, to incorporate in unwanted expressive conduct, even if viewed as benign to the content of the speaker's message. Were the rule of law otherwise, the First Amendment would have no meaning. To require a speaker to incorporate unwanted content in his message, so long as that content is benign or viewed as likely to not be attributed to the speaker, would allow for such a wholesale dilution of the speaker's message that he will have no First Amendment right left.

In *Mahoney*, unlike in *Hurley* and *Sistrunk*, the dissenting speaker chose an appropriate place and manner, the public sidewalk beyond the area of the speaker's own expressive conduct. However, where as in *Hurley* and in *Sistrunk*, the dissenting speaker seeks to incorporate their message or make their dissenting speech within the confines of the expressive conduct of the permitted activity, the dissenting speaker goes too far and intrudes on the First Amendment rights of the permitted speaker.

This Honorable Court should not entertain a rule of law which encourages the dilution of the First Amendment rights of person or groups who obtain a permit to use a public commons for an expressive activity. Persons obtaining such a permit should be allowed to hold their event without disruption and dilution from dissenting speech within the confines of the permitted area. If dissenting speakers wish to line the public sidewalks outside the public area, they are free to do so. But, this Court should not allow a rule of law which would allow dissenting speakers to intrude into the permitted area itself and to imbed their dissenting speech within the confines of the permitted area and the expressive conduct of the activity.

The case at bar would more closely resemble *Mahoney* if the Committee sought to ban dissenting speech on the public sidewalks in the areas surrounding the public commons. However, the Committee did not seek to control the speech on the public sidewalks from which Petitioner could have expressed her dissenting speech. To the contrary, Petitioner sought to inject her dissenting speech in the rally itself.

Based on the foregoing, Respondents assert the Court of Appeals properly concluded that pursuant to *Hurley, supra*, the Committee was entitled under the First Amendment to control the expressive activity at its permitted rally. The court properly concluded that the Committee's authority to control its message included the authority to exclude dissenting speech within the confines of the permitted expressive activity.

CONCLUSION

Based on the foregoing, Respondent City of Strongsville asserts the claim is insufficient to meet the deliberate indifference to obvious consequence standard. The Complaint was therefore properly dismissed as to Respondent City.

Additionally, the Committee's conduct is not fairly attributable to the City for state action purposes.

Respondent City of Strongsville further asserts the Committee was entitled to control its own expressive conduct in the permitted rally area. Petitioner was free to make her dissenting expressive speech outside the permitted area. The Committee should not be compelled to accept Petitioner's dissenting speech in the rally proper.

Respondent City of Strongsville respectfully requests this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

JOHN T. McLANDRICH
Counsel of Record
TODD M. RASKIN
MAZANEC, RASKIN
& RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(216) 248-7906

JOHN D. RYAN, Law Director
City of Strongsville
18688 Royalton Road
Strongsville, Ohio 44136
(216) 238-5720

Attorneys for Respondent
City of Strongsville